

NO. 91-535

Supreme Court, U.S.
FILED
JAN 23 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

-v.-

MORRIS TAKUSHI, Director of Elections,
State of Hawaii; JOHN WAIHEE, Lieutenant
Governor of the State of Hawaii;

BENJAMIN CAYETANO, in his capacity
as Lieutenant Governor of the State of Hawaii,

Respondents.

AMICUS BRIEF OF COMMON CAUSE/HAWAII
IN SUPPORT OF PETITIONER

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I. INTRODUCTION

Amicus Common Cause/Hawaii submits this brief pursuant to Rule 37 of this Court in support of Petitioner Alan B. Burdick and urges that the decision in Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991) be reversed and that Hawaii's write-in voting ban be found violative of the First and Fourteenth Amendments to the U.S. Constitution. Written approval for the submission of this brief by Petitioner Alan Burdick and Respondents is attached to this brief.

II. INTERESTS OF THE AMICUS CURIAE

Amicus Common Cause/Hawaii is a public interest lobbying group which has operated a staffed office in the State of Hawaii for eighteen years. It has fifteen hundred members in the State of Hawaii. Common Cause/Hawaii works to ensure and encourage full public participation in the electoral and legislative processes through lobbying, public

education and community organizing. Through its operations, Common Cause/Hawaii has actively encouraged full citizen participation in the electoral process through working to ensure that the rights of voters are fully protected and extended.

Amicus Common Cause/Hawaii has filed this brief in part because this Court must consider the electoral realities of Hawaii in order to properly assess the constitutional infirmity of the Hawaii write-in voting ban.

In the view of Common Cause/Hawaii, the Ninth Circuit should have upheld Petitioner's right to cast write-in ballots without reference to the political situation in Hawaii. But once the Ninth Circuit undertook to "balance" the voter's right in the context of Hawaii's political situation, it should have done so in a proper manner and considered how the rights of Hawaii voters are affected by the voting ban.

Hawaii elections are dominated by one party and by incumbents who run unopposed. At each election, thousands of voters express dissatisfaction with the single-choice available by casting blank ballots or by not voting at all. It is these disaffected voters whose rights must be balanced against the state interest in the voting ban. The Ninth Circuit incorrectly weighed the narrow interests of candidate placement on the ballot (so-called "easy access") to evaluate the effect of the ban on Hawaii's voters. Instead, the Ninth Circuit should have determined the effect of the ban on the Hawaii electorate as a whole and determined its practical effect on voters' rights in Hawaii.

Common Cause/Hawaii has a deep-seated interest in ensuring that a class of individuals -- those dissatisfied by one-party political domination and incumbent-dominated elections -- have the right to freely express

themselves in the voting booth. In Hawaii elections where there is only one candidate, more than twenty-five percent of the voters appearing at an election do not cast a vote for the unopposed candidate. It is these voters who have not been considered by the Ninth Circuit and it is these voters for whom this Court must preserve a meaningful right to vote for the candidate of their choice.

III. SUMMARY OF ARGUMENT

The right to vote under the U.S. Constitution is a fundamental right of political expression and political association. Hawaii's total ban on write-in voting is constitutionally infirm and shakes the very foundation of our constitutional democracy -- it stops a class of Hawaii citizens from exercising the right to vote. Those citizens who are dissatisfied with one-party domination and incumbent domination are

totally deprived of the right to express their alternative choices through the ballot box.

In applying the Anderson v. Celebrezze, 460 U.S. 780 (1983) balancing test, the Ninth Circuit ignored the voter's interest in freely exercising his constitutional right to vote and incorrectly focused on the interests of candidate access to the ballot. The Hawaii District Court correctly balanced the interests of the voter, not the candidate, against Respondent's rationale for the Hawaii voting ban and found that it "burdens the right to freely vote for the candidate of one's choice, and implicates the rights of free expression and association." Burdick v. Takushi, 737 F. Supp. 582, 591 (D. Hawaii 1990). Instead of the looking to the rights of the candidate, the Ninth Circuit should have assessed the character and magnitude of the Hawaii voting ban on the Hawaii electorate as a whole, particularly that class

of disaffected voters whose rights of expression are impaired by the voting prohibition.

IV. THE NINTH CIRCUIT INCORRECTLY APPLIED THE ANDERSON V. CELEBREZZE STANDARD IN NOT VIEWING VOTING AS A FUNDAMENTAL RIGHT

The right to vote -- to participate as a voter in an election -- is a fundamental right protected by the First and Fourteenth Amendments to the U.S. Constitution. Reynolds v. Sims, 377 U.S. 533, 544-555 (1964). Article I, section 2 of the U.S. Constitution grants qualified individuals "a constitutional right to vote and to have their votes counted." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Id. The right to vote "rank[s] among our most precious freedoms." Williams v. Rhodes, 393

U.S. 23, 30 (1968). Thus, this Court has "repeatedly recognized that all qualified voters have a constitutionally protected right to vote." Reynolds v. Sims, 405 U.S. 533, 554 (1964).

The right to vote is a right that cannot be denied outright, Guinn v. United States, 238 U.S. 347 (1915), although the U.S. Constitution does grant to the states the power to regulate the time, place and manner of elections. U.S. Const. article I, section 4, cl. 1. Based upon this constitutional mandate, this Court has allowed and upheld reasonable regulation of elections, candidates and political parties. E.g., American Party of Texas v. White, 415 U.S. 767 (1974), Clements v. Fashing, 457 U.S. 957 (1982) and Storer v. Brown, 415 U.S. 724 (1974).

Although reasonable restrictions may be imposed on the time, place and manner of voting, "[t]he right to vote freely for the

candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1963). Significantly, the right to vote does not exist in a vacuum since the protection extends not only to the act of casting a ballot itself, but also extends to the right to vote "freely for the candidate of one's choice." Id. (emphasis added). This means that for the right to vote to be properly exercised, the voter "is entitled to vote for any candidate of his choice, subject to reasonable conditions and qualifications imposed by the State." Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 987 (S.D. Ohio E.D. 1968), affirmed in part and modified in part sub nom Williams v. Rhodes 393 U.S. 23 (1968).

These maxims of constitutional protection are not mere statements of belief-

- they are the foundational tenets of our constitutionally protected right to vote. Because the right to vote is so intimately intertwined with the right to free speech-- the right to express one's views -- this Court has continually applied the strictest standard in addressing the validity of a constitutional ban on expression. Thus, the Ninth Circuit should have applied the more stringent standard articulated in Eu v. San Francisco County Democratic Committee, 489 U.S. 214 (1989), that requires the challenged action to be narrowly tailored in pursuit of a compelling governmental interest.

V. WRITE-IN VOTING IS REQUIRED TO COUNTER HAWAII'S POLITICAL AND ELECTORAL HISTORY OF ONE-PARTY RULE AND UNOPPOSED INCUMBENT CANDIDATES

Hawaii's political and electoral history of one-party rule and unopposed incumbent candidates graphically demonstrates the need for the complete exercise by Hawaii voters of

their constitutionally-mandated franchise. This Court has long recognized the need to consider the electoral environment in which electoral rights have been restricted. E.g., Reynolds v. Sims, 377 U.S. 533 (1963)(apportionment) and Williams v. Rhodes, 393 U.S. 23 (1968)(political party access). Thus, in determining whether a particular state election law is violative of a federal constitutional right, this Court has considered and has assessed "the facts and circumstances behind the law", including voting patterns and other relevant circumstances. Id. at 30, 34. In other words, in order to assess "the character and magnitude of the asserted injury to the rights protected", Anderson, supra 460 U.S. at 789, this Court must assess the electoral context within which those rights are exercised.

Hawaii's most recent electoral history shows a restrictive pattern of one-party

domination and incumbent re-election, including re-election without opposition.

A. Hawaii is Dominated by the Democratic Party

The Democratic Party has dominated Hawaii's elections since well before Statehood in 1959. In 1990 Democrats controlled eighty-eight percent (88%) of the state legislative seats -- forty-five of the fifty-one members of the House of Representatives and twenty-two of the twenty-five members of the Senate. Session Laws of Hawaii, Regular Session of 1990 at iv-vii. The historical trend is similar -- from 1979 through 1989, eighty percent (80%) of Hawaii state legislators were Democrats. Department of Business and Economic Development, State of Hawaii: Hawaii State Data Book at 252.

Democratic domination of Hawaii elections has resulted in electoral patterns that severely limit the ability to dissent at the ballot box, an integral part of electoral

freedom. Cf. Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957)(discussing fundamental right of political expression and association in context of unlawful state investigation of individual). It is one-party domination such as exists in Hawaii that has prompted some federal courts to look to write-in voting in assessing the constitutionality of election laws that might otherwise "freeze the status quo." Jenness v. Fortson, 403 U.S. 431, 438 (1971). See Socialist Labor Party v. Rhodes, 220 F. Supp. 963, 987 (S.D. Ohio E.D. 1968) affirmed in part and modified in part sub nom Williams v. Rhodes, 393 U.S. 23 (1968)("A write-in ballot permits a voter to effectively exercise his individual constitutionally protected franchise.").

B. Hawaii Incumbents are Generally Unopposed and there is Substantial Voter Expression of Dissatisfaction through the Casting of Blank Ballots

Hawaii's one-party domination also results in incumbents running unopposed in alarming numbers. For example, in the 1990 primary election, there were twelve Senate seats to be filled. Five of the twelve seats (42%) were filled by Democratic incumbents who were unopposed at both the primary and general elections. Two additional seats (17%) were decided at contested Democratic primaries. See generally Ninth Circuit Record on Appeal 489 et seq: Office of the Lt. Governor, State of Hawaii, 1990 Results of Votes Cast at 1-2. Thus, a total of fifty-eight percent (58%) of Hawaii's state senators were elected by the time the primary election was concluded. Id. Under the Hawaii Constitution, article III, section 4, primary winners who face no ballot opposition at the

general election (unopposed candidates or candidates elected at the Democratic primary) are deemed elected at the primary election. (Hawaii Constitution, article III, section 4: "If a candidate nominated for a seat at a primary election is unopposed for that seat at the general election, the candidate shall be deemed elected at the primary election.") Thus, voters who did not vote in the Democratic Party's primary never had an opportunity to express their views on who was to represent them in the State Senate.

In the House of Representatives, the electoral figures are similar to the Senate's incumbent-dominated elections. Seventeen of fifty-one (33%) incumbent Democratic representatives were elected without any opposition and an additional nine incumbent Democratic representatives (18%) were elected at contested Democratic primaries. A total of fifty-one percent (51%) of Hawaii's

representatives were elected at the primary level. Office of the Lt. Governor, State of Hawaii, 1990 Results of Votes Cast at 3-7. Again, voters who did not participate in the Democratic Primary never had a voice in these elections.

Voter dissatisfaction in having limited electoral choices is evident from the huge proportion of "blank ballots" -- ballots left blank in an election race by voters who cast votes in other election races. Blank ballots are not tallied as votes cast for a candidate, although blank ballots are counted as votes cast in ratification of a constitutional amendment. Hawaii Revised Statutes section 11-151 (1991 Supp.) These are voters who have physically cast a ballot and have voted in some of the electoral races, but who have purposely not voted in one or more races.

Appendix at 1a-4a sets forth the 1990 primary election results for the five state

Senate races and seventeen state House of Representative races where incumbents were elected unopposed. For the five state Senate races, a total of 10,779 blank votes were cast. This constituted twenty-seven percent (27%) of the voters who were at the polls and voted in other races, but who did not cast a ballot for the unopposed incumbents. For the seventeen state House races a total of 16,220, or twenty-nine percent (29%), of the voters who were at the polls and voted in other races did not cast a ballot for the unopposed incumbents. When compared to the percentage of voters who cast blank ballots in contested elections, the proportion of disaffected voters is staggering. For example, an average of twelve percent (12%) of the electors cast blank ballots in the contested state 1990 Senate primary races, compared to the average of twenty-seven percent (27%) blank ballots in one-candidate races. In the State House

racess, an average of thirteen percent (13%) of the electors cast blank ballots in the contested 1990 primary races, compared to the average of twenty-nine percent (29%) blank ballots in one-candidate races.

Although these figures do not necessarily mean that blank ballots cast would represent write-in votes to be cast, these statistics show that in practical terms, Hawaii voters have no outlet to express their dissatisfaction with incumbent-dominated elections. Clearly when over twenty-five percent (25%) of the voters are deciding not to cast a ballot, there exists an atmosphere of one-party and incumbent domination that cries out for constitutional relief.

Moreover, these numbers are not an aberration. They are consistent with recent electoral history. In the 1982-1988 elections, there were twenty-four, twenty-five, twenty-one and twenty-six legislative

seats, respectively, that were filled with only one candidate on the ballot. Office of the Lt. Governor, State of Hawaii, 1982 - 1988 Results of Votes Cast.

These electoral statistics are more startling when compared to the extremely high electoral participation of Hawaii voters. In the 1990 general election, seventy-eight percent (78%) of the registered voters cast votes. Sixty-three percent (63%) of the registered voters participated in the primary. 1990 State of Hawaii Data Book at 241. Obviously, voters in Hawaii go to the polls in far greater numbers than they vote for unopposed incumbent legislators.

Political reality in Hawaii does not square with the Ninth Circuit reasoning that the Hawaii voting ban "does not restrict the alternative channels available to Burdick for expressing his political views" and that "'ample alternative channels' exist for

Burdick to advance his political views." Burdick v. Takushi, supra, 937 F.2d at 419. As a matter of voting reality, by leaving the ballot blank, thousands of voters at each election show their preference for someone other than the single choice available. Thus, the only alternative available to them is a meaningless one. They have been deprived of one of the fundamental bases of voting rights -- the right to have one's vote counted for the candidate of one's choice, even if that is a minority choice:

Our form of government is built upon the premise that every citizen shall have the right to engage in political expression and association.... History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 250-251

(1957). In Hawaii, the voices cry out to be heard, but lack a vehicle to vent their expression. Legitimate vehicles of political dissent -- the ballot box -- are foreclosed by the voting ban. Disaffected voters are left with a meaningless option -- to refuse to cast a ballot when a candidate is unopposed.

C. The State's Justifications for the Voting Ban are Thinly-Veiled Attempts to Protect the Incumbent Majority

When viewed against the Hawaii political backdrop, Respondents' interests in upholding the voting ban are shown to be thinly-veiled attempts to preserve the incumbent majority. The proffered justifications -- prevent sore loser candidacies, discourage late blooming candidates and upholding primary automatic seating, Burdick v. Takushi, supra, 937 F.2d at 420-21, all operate in practice to ensure that incumbent candidates and Democratic party candidates are favored in the electoral process.

VI. HAWAII'S SO-CALLED EASY ACCESS TO THE BALLOT SHOULD NOT BE CONSIDERED IN ASSESSING THE CONSTITUTIONALITY OF A WRITE-IN VOTE PROHIBITION

The Ninth Circuit totally failed to consider how the Hawaii's total ban on write-in voting infringes on Burdick's First and Fourteenth Amendment rights because it confused the voter's right to vote for a candidate of his or her choice with the interests of candidates who have "considerable ease of access to the ballot." Burdick v. Takushi, supra, 937 F.2d at 419. The Ninth Circuit did not consider "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." Anderson, supra, 460 U.S. at 789 (emphasis added). The Ninth Circuit upheld the disenfranchisement of Hawaii voters while failing to even consider the interests of the voters themselves. As shown in part V.

supra, the character of the injury is Draconian - - Hawaii totally bans write-in voting. The magnitude of the injury is pervasive - - thousands of Hawaii voters have no mechanism to register their dissatisfaction with the incumbent majority.

Simply stated, the interests of candidates in gaining access to the ballot are not the same as the interests of voters in exercising their choice on the ballot. These rights are distinctive and separate. Although this Court has recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation," Anderson, supra, 460 U.S. at 786, this Court has placed greater importance on a voter's right to vote for the candidate of his choice than on a candidate's right to run for office. Bullock v. Carter, 405 U.S. 134, 142-43 (1972). Moreover, this Court has refused to attach the status of a fundamental right to candidacy.

Id.

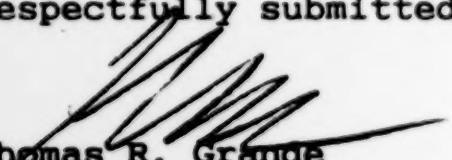
Easy access for a candidate before an election does nothing to assuage the ban on a voter to make his choice at an election. The voter faced with a one-party slate or an unopposed incumbent simply has no choice, see V. supra, and must either vote for the incumbent or not vote at all. Unfortunately, Hawaii's write-in voting ban has forced many Hawaii voters to choose not to vote at all by casting blank ballots.

VII. CONCLUSION

This Court is faced with a decision that will affect the rights of the disaffected voters of Hawaii to exercise meaningful choices at the ballot box. The Ninth Circuit has taken a bold and unprecedented step toward disenfranchising those Hawaii voters who wish to participate -- at the ballot box -- as fully as possible within Hawaii's restrictive voting environment. The Ninth Circuit

decision should be reversed and this Court should declare Hawaii's write-in voting ban to be violative of the First and Fourteenth Amendments to the U.S. Constitution.

Respectfully submitted,



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Appendix 1a

Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Senators Elected Without
Opposition

State Senate District 3

Solomon, Malama	8404	75.3%
Blank Votes	2749	24.6
Over Votes	0	0.0

State Senate District 13

Kobayashi, Bert	5143	74.3
Blank Votes	1776	25.6
Over Votes	0	0.0

State Senate District 17

Chang, Anthony K. U.	5697	68.3
Blank Votes	2632	31.6
Over Votes	0	0.0

State Senate District 19

Nakasato, Dennis M.	4090	72.3
Blank Votes	1562	27.6
Over Votes	0	0.0

State Senate District 22

Tungpalan, Eloise	6703	76.4
Blank Votes	2060	23.5
Over Votes	0	0.0

TOTAL BLANK VOTES	<u>10,779</u>
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AVERAGE PERCENTAGE OF BLANK VOTES	<u>27%</u>
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Appendix 2a

Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Representatives Elected
Without Opposition

State Representative District 2

Tajiri, Harvey S.	3888	55.1%
Blank Votes	3167	44.8
Over Votes	0	0.0

State Representative District 3

Metcalf, Wayne	3303	58.6
Blank Votes	2330	41.3
Over Votes	0	0.0

State Representative District 4

Takamine, Dwight Y.	3213	59.7
Blank Votes	2167	40.2
Over Votes	0	0.0

State Representative District 8

Honda, Herbert J.	4819	78.1
Blank Votes	1347	21.8
Over Votes	0	0.0

State Representative District 10

Baker, Roz	3319	83.6
Blank Votes	650	16.3
Over Votes	0	0.0

Appendix 2a - Continued

State Representative District 13

Bunda, Robert (Bobby)	3443	85.2%
Blank Votes	594	14.7
Over Votes	0	0.0

State Representative District 25

Say, Calvin K. Y.	3502	80.5
Blank Votes	844	19.4
Over Votes	0	0.0

State Representative District 29

Hagino, Dave	2319	73.7
Blank Votes	825	26.2
Over Votes	0	0.0

State Representative District 31

Fukunaga, Carol	2773	77.3
Blank Votes	811	22.6
Over Votes	0	0.0

State Representative District 32

Hirono, Mazie	2369	81.3
Blank Votes	542	18.6
Over Votes	0	0.0

State Representative District 36

Yoshimura, Dwight L.	1990	71.2
Blank Votes	802	28.7
Over Votes	0	0.0

Appendix 2a - Continued

State Representative District 37

Arakaki, Dennis A.	2178	74.5%
Blank Votes	743	25.4
Over Votes	0	0.0

State Representative District 40

Horita, Karen K.	2801	66.7
Blank Votes	1398	33.2
Over Votes	0	0.0

State Representative District 43

Ige, David Y.	4083	76.3
Blank Votes	1264	23.6
Over Votes	0	0.0

State Representative District 44

Yonamine, Noboru (Nobu)	3085	73.1
Blank Votes	1132	26.8
Over Votes	0	0.0

State Representative District 50

Kanoho, Ezra R.	4607	53.4
Blank Votes	4018	46.5
Over Votes	0	0.0

State Representative District 51

Kawakami, Bertha C.	5143	61.9
Blank Votes	3160	38.0
Over Votes	0	0.0

TOTAL BLANK VOTES	<u>16,220</u>
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AVERAGE PERCENTAGE OF BLANK VOTES	<u>29%</u>
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Appendix 3a

Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Senators Elected at Democratic
Primary

State Senate District 16

Blair, Russell	4963	73.1%
Steelquist, John A.	800	11.7
Blank Votes	1025	15.0
Over Votes	1	0.0

State Senate District 25

Fernandes Salling, Lehua	9454	55.8
Tacbian, Toefilo (Phil)	6004	35.4
Blank Votes	1464	8.6
Over Votes	6	0.0

Appendix 4a

Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Representatives Elected at
Democratic Primary

State Representative District 15

Bellinger, Reb	1991	46.3%
Beirne, Danielle	1255	29.1
Nakamoto, Guy	721	16.7
Blank Votes	328	7.6
Over Votes	3	0.0

State Representative District 17

Ige, Marshall K.	2653	51.2
Ito, Kenneth (Ken)	1595	30.8
Kaleikini, Lovell F.	598	11.5
Blank Votes	326	6.3
Over Votes	1	0.0

State Representative District 27

Taniguchi, Brian T.	3404	57.9
Hayashi, Virgie	2030	34.5
Blank Votes	436	7.4
Over Votes	2	0.0

State Representative District 33

Tam, Rod	3702	75.5
Fukuda, Keith H.	539	11.0
Kaneshiro, Kenny	187	3.8
Blank Votes	457	9.3
Over Votes	4	0.0

Appendix 4a Continued

State Representative District 38

Alcon, Emilio S.	1499	54.8%
Kubota, Stan	609	22.2
Blank Votes	620	22.7
Over Votes	3	0.1

State Representative District 42

Hashimoto, Clarice Y.	2488	65.2
Morita, Hiroaki (Rocky)	590	15.4
May, Gloria E. (Moana)	144	3.7
Lumpkin, Bobby J.	102	2.6

State Representative District 45

Duldulao, Julie R.	3508	74.2
Vidal, Allen	460	9.7
Blank Votes	752	15.9
Over Votes	4	0.0

State Representative District 46

Oshiro, Paul T.	1983	72.6
Alexander, Jeffrey	508	18.6
Blank Votes	239	8.7
Over Votes	0	0.0

State Representative District 47

Amaral, Annelle	1307	50.8
Wong, Mike	988	38.4
Blank Votes	273	10.6
Over Votes	3	0.1